TAM KAM CHEONG v. STEPHEN LEONG KON SANG & ANOR.

[F.C. (Lee Hun Hoe C.J. (Borneo), Chang Min Tat & Salleh Abas F.JJ.) April 27 & July 9, 1979]

[Kota Kinabalu — Federal Court Civil Appeal No. 48 of 1978]

Land Law — Seven-storey commercial building — Separate owners of floors in building — Staircase to roof-top giving access to water tanks — Staircase sealed by owners of upper floors — Right of access stated in purchase agreement — Whether there is easement of right of way — Property a single unit under one title — Restrictive covenant — Equitable interests — First in time prevails — Joint tenancy — Meaning of "land" — Whether includes building — Whether mandatory injunction should be given — Damages — Sabah Land Ordinance (Cap. 68), s. 11.

Equity — Restrictive covenant — Equitable interests — First in time prevails — Whether mandatory injunction can be given.

English Law — Whether English equitable principles apply in Sabah — Sabah Application of Laws Ordinance (Cap. 6).

Evidence — Oral evidence — Whether admissible to vary terms of written agreement — Evidence Act, ss. 91 & 92.

In this case the vendors, the owners of a piece of land held on a 999 year lease in Sandakan, built a seven storey commercial building on it and sold the ground and the first floor to the respondents. The oral agreement and subsequently the purchase agreement gave the respondents access to the roof top of the building where the water tanks were sited. The vendors sold the other five floors to the appellant. The appellant used the floors for a hotel business and applied for permission to make alterations to the building, to seal the staircase and convert the space into rooms. The respondents claimed that they had been deprived of their right of access to the roof top and brought an action against the appellants. The learned trial judge upheld the respondents' claim and awarded a mandatory injunction and a sum of $10,000 by way of damages. The appellants appealed.

Held: (1) as the property was in law one single unit held under one title, the respondents could not claim to have an easement of right of way;

(2) the vendors in this case sold their property to the respondents and the appellant under a building scheme so that the benefits of restrictive covenants taken by the respondents were attached to the floors bought by the appellant. The ground and the first floors of the building were sold to the respondents with a stipulation annexed to the building that the respondents shall have access to the roof top for the inspection of the water tank which supplies water to these two floors and that such access would be enjoyed by the respondent via the staircase which was required to be maintained kept open and clean and hygienic by the respective owners of the floors. The appellant knew of this restriction and by sealing and demolishing the staircase the appellant therefore acted in breach of the respondents' right which was attached to the whole of the building;

(3) the appellant and the respondents were joint tenants of the building and neither had a better right than the other. The destruction of part of the property, in this case, the sealing and demolition of the staircase by the appellant gave the respondents a right of action against the appellant;

(4) the grant of an injunction is discretionary and in this case the respondents were not entitled to the mandatory injunction as they were given an alternative way of access to the roof top and as the cost of restoring the staircase would be expensive;

(5) the damages awarded were too high and should be reduced to $5,000.

Cases referred to:-

(1) *Prenn* v. *Simonds* [1971] 1 W.L.R. 1881.
(2) *Tulk* v. *Moxhay* (1848) 2 Ph. 774.
(3) *Re Nosbet and Pitt's Contract* [1906] 1 Ch. 386.
(4) *Austerberry* v. *The Corporation of Oldham* (1885) 2 Ch. D. 750.
(5) *Mann* v. *Stephens* (1846) 13 Simon 377; 60 E.R. 665.
(6) *Newman* v. *Real Estate Debenture Corporation Ltd. and Flower Decoration Ltd.* [1940] 1 All E.R. 131.
(7) *Lord Strathcona S.S. Co.* v. *Dominion Coal Co.* [1926] A.C. 108.
(8) *Lin Nyuk Chan* v. *Wong Sze Tsin* [1964] M.L.J. 201, 206.
(9) *Rendall* v. *McWhirter* [1952] 2 Q.B. 466.
(10) *Bradley-Hole* v. *Cusen* [1953] 1 Q.B. 300, 306.
(11) *Ferris* v. *Weaven* [1952] 2 All E.R. 233.
(12) *Elliston* v. *Reacher* [1908] 2 Ch. 374.
(13) *Reid* v. *Bickerstaff* [1909] 2 Ch. 305, 319.
(14) *Wilkinson* v. *Haygarth* (1847) 12 Q.B. 837.
(15) *Martyn* v. *Knowllys* (1799) 8 T.R. 145.
(16) *Morris* v. *Redland Bricks Ltd.* [1970] A.C. 653, 665.
(17) *Wrotham Park Estate* v. *Parkside Home* [1974] 2 All E.R. 321, 337.
(18) *Durell* v. *Pritchard* (1866) L.R. 1 Ch. App. 244, 250.
(19) *Allport* v. *The Securities Corpn.* (1895) 64 L.J. Ch. 491.
(20) *Rookes* v. *Barnard* [1964] A.C. 1129, 1226-1228.

FEDERAL COURT.

W. Davidson (*Ian Chin* with him) for the appellant.

Lim Kean Chye (*Shelly Yap* with him) for the respondents.

Salleh Abas F.J. (delivering the judgment of the Court): This appeal relates to the claim by the respondents of their right of access to the roof top of a seven-storey commercial building, the ground and first floors of which are owned by them, via the common staircase connecting all the floors of the building. The learned trial judge below upheld the respondents' claim and awarded against the appellant a mandatory injunction and a sum of $10,000 by way of damages. Hence the present appeal.

For the purpose of our judgment, it is necessary to state the facts as follows.

Kuan Kum Ming and Kwan Yui Ming (referred to in this judgment as the "vendors") owned a piece of land, a 999 year lease — Sandakan Town Lease No. 809 — containing an area of 1,500 square feet. They built a seven-storey commercial building on it. On the roof top of the building, there are constructed two water tanks of equal size, each capable of holding 3,250 gallons of water. One of the tanks supplies water by means of pipes connected therewith to the ground and the first floors of the building. Access to the water tank was gained by using the common staircase which connected the ground floor with all other floors.

The vendors sold the ground and the first floors to the respondents (Stephen Leong Kon Sang and Leong Den Choi) for $295,000, whilst the other five floors were sold through the agency of Man Woo Leong and Co., Sandakan, for $300,000 to the appellant (Tam Kam Cheong). The respondents, paying a deposit of $5,000 towards payment of the purchase price, entered into occupation of the ground and the first floors in November 1968 and started a restaurant business there in the same month under the name of "Fortuna Bar and Restaurant". A written Purchase Agreement between the respondents and the vendors was signed and dated on August 5, 1970. Memoran-

dum of Transfer to the extent of 2/7 of the property in favour of the respondents was executed and dated September 22, 1970, and finally registered as Memorial No. 103337 on January 29, 1971.

It appears that the vendors since 1969 have been living in Hongkong. The appellant purchased the remaining five floors of the building from the vendor's agent, Man Woo Leong and Co. for $300,000. Upon payment of $50,000 deposit towards payment of the purchase price, the appellant entered into occupation of these five floors by being given keys thereto on October 16, 1969. The balance of $250,000 was paid on two subsequent occasions: on June 29, 1970 $200,000 was paid to the agent, and on August 5, 1970 $50,000 was paid to Messrs. Peter Lo and Co., the vendors' solicitors. On this latter date, the appellant was given by Messrs. Peter Lo and Co., a copy of draft Purchase Agreement similar to the one signed by the respondents, but he refused to sign it. However, on that date the appellant signed a Memorandum of Transfer dated September 22, 1970 to the extent of 5/7 of the whole property in his favour. This Memorandum was finally registered as Memorial No. 13338 on January 29, 1971 — i.e. on the same day as the registration of the respondents' Memorandum of Transfer.

The appellant is running a hotel business known as Gaya Hotel, which is adjoining to the commercial building which he and the respondents have bought. Soon after the entering into occupation of the building, the appellant submitted to the Sandakan Town Board two plans for structural alterations of the floors which he had purchased so that they would form an extension or part of his hotel business. The first plan D1 was approved on December 19, 1969, and the second plan D2 approved on August 3, 1970. Plan D1 related to the alterations of the second and third floors, whilst plan D2 concerned the alterations of the fourth and fifth floors. These plans involved the sealing of the staircase on the second floor, its demolition on the second, third, fourth and fifth floors, and the construction of extra rooms over the areas gained by its demolition. The works of sealing the staircase began in the middle of June 1970, and was completed by the end of the month, so that no access from either the ground floor or the first floor to the roof top could any longer be had within the building by the use of the staircase.

No protest was made by the respondents against the sealing of the staircase whilst the work was in progress in June 1970. The first complaint from them was a letter dated July 29, 1971, by their solicitors, Messrs. Peter Lo and Co. addressed to the Town Board asking the latter to find a solution to the respondents' right of access to the roof top of the building. As a result of that letter, at the suggestion of the Town Board, the appellant offered to the respondents a guarantee of access via the staircase and elevator of the adjoining Gaya Hotel. The respondents declined to accept the guarantee so offered because, according to respondent No. 1, such guarantee would be useless as it would not be permanent. Subsequently, on the instruction of the respondents, the firm of solicitors Michael K.M. Yong and Co. wrote two letters of protest to the appellant. These were on August 13, 1970, and November 17, 1970. By this time the respondents had already commenced the present action against the appellant, the writ having been issued on November 3, 1970. The Certificate of Occupation Permit in respect of the alterations was issued by the Town Board on March 1, 1971.

The respondents' explanation for not making protest earlier was given by respondent No. 1. He deposed that he did not know that the staircase was going to be sealed up and thus preventing him from going up to the roof top to inspect the water tank. This explanation seems to us to be reasonable in view of his evidence in cross-examination that although the respondents started the restaurant business in November 1968, from 1969 to 1974 the business was run by someone else whilst the respondents were only collecting 5% commission from the profits of the restaurant business.

The respondents' claim to the right of the use of staircase and access to the roof top for the purpose of inspecting the water tank supplying water to their ground and first floors is stated in their statement of claim to be based on "an oral agreement some time in 1968 and later reduced into writing on August 5, 1970 between them and the vendors". The written Purchase Agreement dated August 5, 1970 contained the following clauses which are material to the case:

Clause 10: "It is perfectly understood by the purchasers that the roof of the said building shall exclusively be owned and possessed and remain in possession of the owner or purchaser of the sixth floor of the said building, provided that all owners of the other floors of the said building shall always have free access to the roof for maintaining and cleaning their water tanks built thereon according to the approved plans and drawings."

Clause 11: "The staircase shall be open to use by the said respective owners and their friends, relatives and visitors and shall be kept clean and hygienic and maintained by the said respective owners."

Clause 13: "The ... stairs, ... water pipes supplying the said building ... shall be jointly maintained by the said respective owners in equal proportions."

The respondents thus contended that by sealing the staircase on the second floor and its demolition on the second, third, fourth and fifth floors, the appellant was infringing the respondents' right on account of —

(a) breach of covenant contained in the Purchase Agreement which they entered with the vendors on August 5, 1970, and of which the appellant had notice;

(b) breach of their common law right of tenants in common;

(c) breach of their easement of right of access to their water tank on the roof top through the common staircase which had been sealed and demolished; and

(d) negligence. However, this last ground was abandoned by the respondents during the course of the trial.

The first question that we have to deal with is this. Have the respondents established that they have a right of access to the roof top? From the very nature of the building concerned, which is constructed as one integrated whole consisting of several floors,

each floor being self-contained and capable of being separately owned and the water supply to the ground and first floors coming from one of the two water tanks placed on the roof top whilst the supply to the other five upper floors coming from the other tank, it is unreasonable to deny the respondents who purchased these two lower floors a right of access to the roof top. Had it not been for the fact that the building is man-made, the staircase and the water tanks would have fitted in with the description of natural rights of property. (See *Cheshire's* Modern Law of Real Property, Ninth Edition, page 461). Indeed such right of access is recognised by Clause 10 of the Purchase Agreement dated August 5, 1970, between the vendors and the respondents, in that whilst the roof top would be owned by any one who owns the sixth floor, the owners of the other floors "shall always have free access to the roof for maintaining and cleaning their water tanks built thereon". Moreover, this right was exercised by the respondents who said in their evidence that since entering into occupation in 1968 they were in the habit of going up to the roof top to inspect their water tank and that they had ceased doing so only since the staircase was sealed and demolished at the end of June 1970. In the circumstances, it is clear to us that the respondents who purchased the ground and the first floors since November 1968, had a right of access to the roof top.

The next question is whether such right of access is by the use of the common staircase of the building or by any other alternative route? Counsel for the appellant submitted that the respondents could not have the right of access through the staircase by virtue of the Purchase Agreement dated August 5, 1970, because the staircase was completely sealed by the end of June 1970, and so the Purchase Agreement which purported to have bestowed such right on the respondents could not be effective to confer such right, since the subject-matter of the grant, i.e. the staircase, was no longer in existence on the date of the Purchase Agreement. Counsel also submitted that no evidence was led by the respondents to show that there was an oral agreement conferring on them such right of use of the staircase. In our judgment, whilst it is true that there was no evidence led of any oral agreement between the respondents and the vendors, the existence of such oral agreement can in this case be inferred from the circumstances. It is not disputed that the respondents purchased the first and the ground floors for $295,000, and that they had paid a deposit of $5,000, and that they entered into occupation in November 1968, and that they used to go up the roof top to inspect the water tank, and that they signed a written Purchase Agreement on August 5, 1970. The conduct of the respondents in so acting can only be explained by the fact that there must be in existence some kind of oral agreement entitling them to so conduct themselves. It is noted that no date of sale was given and that there was no evidence as to whether the respondents were paying rents to the vendors during the period beginning November 1968 to August 5, 1970. In our view, it is safe to assume, however, that no rents were paid at all and that insofar as the vendors and the respondents are concerned, the moment a deposit was paid followed by entering into occupation, the ground and the first floors must have been treated as sold to the respondents. It is unthinkable that such a serious business as buying a property such as this was done without reference to an agreement, though oral.

It is true that in the court below counsel for the respondents seemed to base the case on the Purchase Agreement dated August 5, 1970, and was driven to urge the court to treat the date of the Agreement (August 5, 1970) as being erroneous in view of the fact that the staircase was completely sealed by the end of June 1970. In our judgment, whatever the date of this Purchase Agreement might be, either earlier or later than or on August 5, 1970, it is clear that this Agreement was not the first agreement between the respondents and the vendors. There must have been a preceding oral agreement between them touching the sale of these two floors to the respondents. The respondents' case is clearly stated in their statement of claim to be based on "oral agreement, which was later reduced in writing". Such reduction in writing was done by the written Purchase Agreement dated August 5, 1970. Since the Agreement was reduced in writing, the respondents were perfectly entitled not to adduce evidence as to oral agreement. Indeed if they were to do so for the purpose of proving the terms of the agreement, or for the purpose of contradicting or varying them when the agreement has been reduced into writing, their evidence would be excluded by sections 91 and 92 of the Evidence Act. (See *Prenn* v. *Simonds*[1]). In our view, therefore, the appellant's objections to the lack of evidence as to the existence of oral agreement between the vendors and the respondents and to the inconsistency of the Purchase Agreement because of its date with the date of the completion of the sealing of the staircase are not so material as to dispose of this appeal in the appellant's favour. In our judgment there was an oral agreement between the vendors and the respondents and that the terms of this agreement were later reduced into writing by the Purchase Agreement dated August 5, 1970.

As the respondents' right to the use of the staircase is founded on the Agreement between them and the vendors, how could such right affect the appellant who is not a party to the Agreement? The respondents claimed that they had acquired from the vendors an easement of right of way by the staircase and that the appellant's portion of the building being a servient tenement must be so kept as to enable the respondents, being the owners of dominant tenements, to use the common staircase. In our view, this claim lacks precision and must fail. For a claim of easement to be established, every easement must possess four characteristics, i.e.

(1) There must be a dominant and servient tenement;

(2) An easement must accommodate the dominant tenement, i.e. appurtenant to it and connected with the normal enjoyment of the dominant tenement;

(3) Dominant and servient owners must be different persons; and

(4) An easement must be of such status as can be the subject-matter of a grant, i.e. its nature and extent should be capable of exact description.

(See *Cheshire* ibid pp. 448-454). In the case before us, despite the fact that property is owned by two different owners, the respondents and the appellant, and that the floors owned by the respondents could be treated as dominant tenements, whilst those owned by the appellant as servient tenements, nevertheless in law the property is just one single unit held under one title, i.e. Sandakan Town Lease No. 809. The case might be different if the Land (Subsidiary Title) Enactment 1972 of Sabah which was passed on July 22, 1972 as Enactment No. 9 of 1972 has been put into force. In our view the respondents' claim that they have an easement as regards the use of the common staircase must fail.

However, the main thrust of the respondents' case is that their Purchase Agreement dated August 5, 1970, with the vendors contained restrictive covenants in that neither the vendors nor their assigns are at liberty to prevent the respondents from the use of the staircase, not to say, to demolish it altogether. According to Clause 11 of the Purchase Agreement, the staircase shall be "open" to use by the respective owners of the floors, their friends, relatives and visitors and be kept clean and hygienic and maintained by the respective owners. It is thus not open to any owner of the floor to block the staircase. The requirement of keeping the staircase open for the enjoyment of and use of the owners of the floors and others connected with the building constitutes a restriction on every owner of the floor; the restriction being that the staircase must not be blocked or demolished and that the use of the building implies the continued existence of the staircase. It being a restrictive covenant, the respondents are entitled to enforce it against the appellant who prevented the use of the staircase by sealing and demolishing it. Counsel for the appellant, on the other hand, submitted that the Agreement was not a covenant since it is not an agreement under seal, and that even if it is a covenant, it was a positive covenant and not a negative covenant so that the rules relating to restrictive covenants do not apply.

In our judgment, there is no merit to say that only an agreement under seal can constitute a covenant whilst an agreement under hand cannot. For this purpose, it is sufficient to quote *Halsbury's* Laws of England 3rd Edition Vol. 11 para. 706 at pages 439-440 as follows:

> "The word (covenant) will, however, be construed to cover stipulations in an agreement under hand if otherwise it would have no effect as where a document refers to the 'covenant' contained in a lease which is not under seal."

Further, in Vol. 23 of the same edition at para. 152, page 75, a restrictive covenant is defined as "a covenant or *agreement* ... restrictive of the user of land". There is therefore no magic in the word "covenant".

As to the submission that the covenant contained in Clause 11 of the Purchase Agreement dated August 5, 1970, is not a negative covenant, it is necessary for us to refer to the facts of *Tulk* v. *Moxhay*,[2] on which the concept of restrictive covenants was founded. In that case, a covenant to "keep and maintain a piece of ground and square garden and the iron railing round the same, in its then form and in sufficient and proper repair as a square garden and Pleasure Ground, in an open state, uncovered with any building" was held to constitute a restrictive covenant restricting the covenantor and his successors in title from erecting any building on the ground. Similarly, in the present case, Clause 11 of the Purchase Agreement stipulated that the staircase shall be open, maintained and kept clean and hygienic by the respective owners of the floors for their use and enjoyment and that of their friends, relatives and visitors. Surely it must have been the intention of the parties that nothing shall be done to prevent the staircase from being open, maintained and kept otherwise than in clean and hygienic condition. The essence of negative covenant does not lie in its form but in its substance. A covenant couched in a positive form is but a negative covenant if in substance it is negative (*Cheshire, ibid* page 518). We do not think therefore that there is any merit in the appellant's objection on this ground.

The doctrine of restrictive covenants founded on *Tulk* v. *Moxhay, supra,* as later explained in *Re Nosbet and Pitt's Contract*[3] is this. The owners of land to which the benefit of a covenant restricting the use of other land (i.e. burdened land) has been attached may enforce that restriction by injunction against all persons who subsequently own or occupy the burdened land unless they obtain a legal estate for value without notice of the covenant. It is an equitable doctrine formulated by equity judges in order to fill the gap left uncovered by the common law. At common law, the benefits of covenants, be they positive or negative, which are made with a covenantee who has an interest in the land to which they relate, passes to his successors in title. The burden of such covenants, however, does not run with the covenantor's land. Therefore, his successors in title are not bound to observe the covenants (*Austerberry* v. *The Corporation of Oldham*[4]). It was therefore left to the equity to allow enforcement of the burden of the covenant against the covenantor's successors in title, provided that the following conditions are fulfilled —

(i) The covenant must be negative in nature, i.e. it must be a covenant to desist from doing a certain thing.

(ii) The covenantee must retain the land from the protection of which the restrictive covenant is taken and in the case of subsequent assignments the assigned must show that the benefit of the covenant has passed to him.

(iii) The covenant must touch and concern the land.

(iv) The covenant must be imposed between vendor and purchaser.

(See *Keeton* and *Sheridan*: Equity (1976) 2nd Ed. p. 336). The doctrine became very popular and applicable mostly in cases where an owner of land selling part of it to a purchaser wishes to protect the unsold part by taking a covenant from his purchaser restricting the mode of use of the sold part. The doctrine is also applicable against the vendor where he covenanted with his purchaser to restrict the use of the unsold land in favour of the tenements which he had sold to his purchaser. (*Mann* v. *Stephens*[5]). Restrictive covenants are also invoked in cases of simultaneous

sale of several pieces of land or sale under a building scheme. In *Newman* v. *Real Estate Debenture Corporation Ltd. and Flower Decoration Ltd.*,[6] restrictive covenants were successfully invoked by a tenant of one of residential flats in a block against the owners and other tenants preventing them from using their flats otherwise than for residential use. The doctrine of restrictive covenants is also extended to restrictions to the mode of user of a ship (*Lord Strathcona S.S. Co.* v. *Dominion Coal Co.*[7]).

The next question here is whether the doctrine of restrictive covenants applies in Sabah? There is no doubt that by virtue of section 2 of the Application of Laws Ordinance (Cap. 6) of Sabah, this doctrine, being an equitable doctrine, is applicable to Sabah. Neither would section 68 of the Land Ordinance (Cap. 68) of Sabah prevent the application of the doctrine in Sabah (*Lin Nyuk Chan* v. *Wong Sze Tsin*[8]). The next question is whether the doctrine is applicable to the sale of floors of a building by a common vendor to two different purchasers? If the doctrine of *Tulk* v. *Moxhay*, as the doctrine of restrictive covenants is generally referred to, is applicable against the vendor, against an owner and the tenant in tenancy of a residential flat in a block and even to the use of movable goods, like a ship, we do not see why the doctrine cannot be made applicable in the present case before us to the sale of floors of a building with restriction as to the use of a common staircase, provided all the necessary conditions for its application are satisfied.

The respondents purchased the ground and the first floors from the vendors with covenants that the vendors and their successors in title shall keep the staircase open, clean and hygienic, and maintain the same, so as to enable the respondents to go up to the roof top to inspect their water tank. Further, from the language of the Purchase Agreement dated August 5, 1970, which the respondents and the vendors signed, it appears that the vendors were building their tenements for the purpose of selling to more than one purchaser and that similar agreements as the one signed on August 5, 1970 would be entered into with each purchaser. However, it turns out to be only two purchasers; the respondents and the appellants. Whilst the respondents signed the Agreement, the appellant on being shown one, refused to do so, and yet continued with the process of buying the property by executing and registering the necessary Memorandum of Transfer. If notice is required to attract him to this equitable burden as to the use of staircase and the respondents' right of access to the roof top, the fact that he was shown a similar document and refused to sign it, in our view, constitutes a sufficient notice. In any case, since the interests of the appellant on or about August 5, 1970 were still equitable, the question of notice is really not essential, it being required only as against a legal owner. Both the respondents and the appellant at that time were having equitable interests in the property, and both became legal owners on the same date: January 29, 1971. Thus the first equitable interests in time, i.e. the respondents must prevail and therefore bind the appellant: *qui prior est tempore portior est jure.*

The learned counsel for the appellant submitted to us that prior to the registration of the respondents' Memorandum of Transfer, the nature of their interests fell into two categories, (a) in the period between their occupation of the premises, i.e. November 1968, and the signing of the Purchase Agreement August 5, 1970, the respondents' interests were a mere licence; and (b) between August 5, 1970 and January 29, 1971, i.e. the date of the registration of Memorandum of Transfer, their interests were equitable as beneficial owners. The distinction is based on the ground that the sale was completed on that date by the full payment of the purchase price and the signing of the Purchase Agreement. Therefore, since the respondents became owners only after the staircase had already been sealed at the end of June, the appellant could not be bound by the restrictions as to the use of a staircase which no longer existed then. We do not agree with this submission as in our view the respondents' interests prior to August 5, 1970 were equitable and not a mere licence. If they were, surely the appellant's interests were also a mere licence, because he too only completed paying the full price on that date. Such interests gave him no right to carry out the structural alterations of the premises.

Although the first alteration plan D1 was submitted in the name of the vendors, it was not the vendors who carried out the alterations. From the evidence, the vendors did not seem to be interested in keeping the property otherwise than for sale through their agent and solicitors in Sandakan. The plan D1 did not carry the owners' signatures as required by By-law 8 of the Building By-laws of Sandakan Town Board. The plan, however, contained the following statement:

"Re partitioning. The owner fully agrees to re-partition."

The author of this statement must be the architect Parker Kwan; but neither the architect nor the vendors were called to give evidence. Even if the architect were called to give evidence, such statement in the absence of the vendors is at best a mere hearsay which should be disregarded for the purpose of proving that the alterations were agreed to by them. Assuming that the vendors authorised the alterations and the plan D1 approved in December 1969 was submitted with their consent, it is unthinkable that later they were so ready and willing as to sign the Purchase Agreement dated August 5, 1970 with the respondents. These two acts are inconsistent with each other. We cannot ascribe to the vendors as being out of their mind when signing this agreement. The proper view which should be taken by us is that since they were not called to give evidence and the statement attributed to them in plan D1 is a mere hearsay, the vendors did not give approval to the appellant for the alterations of the building. As regards alteration plan D2 approved by the Town Board on August 3, 1970, there is no evidence as to when it was submitted. In any case it is unthinkable that it was submitted and approved on the same day. The inference is that the plan D2 must have been submitted much earlier. This plan is not submitted in the names of the vendors but in the name of the appellant. Why is it different from plan D1? There is no change in the status of the appellant's interests. He was then not yet the legal owner. If the appellant's interests prior to August 5,

1970 (to use his own argument) was merely a licence, surely it was not proper for him to submit the plan and carry out the alterations.

In our view, the classification of the parties' interests prior to August 5, 1970 as being a mere licence leads to absurdity and only serves to confuse the true nature of the transactions in this case. It is obvious that the appellant regarded himself as being owner of the five floors which he had purchased from the moment he paid the first deposit on October 16, 1969. This attitude is borne out by his conduct in starting the alterations of the floors and refusing to sign a similar purchase agreement although he was shown one on August 5, 1970. Similarly, in our view, the interests of the respondents prior to August 5, 1970 were not mere licence but also as equitable owners. Although the Purchase Agreement was dated August 5, 1970, the agreement is merely the reduction into writing of the terms which they had earlier agreed orally. We do not therefore find any substance or even relevancy in the submission of the learned counsel on the nature of the respondents' interests as a mere licence prior to August 5, 1970.

Even if the respondents' interests prior to August 5, 1970 were a mere licence instead of being beneficial ownership, they were not a bare licence since such licence was coupled with the right of occupation of the building as a purchaser, including the rights of enjoyment of the staircase and access to the roof top of the building. Revocation of such licence can be restrained by injunction as it constitutes, according to certain views though somewhat critically received, an equitable interest analogous to restrictive covenant which binds the land in the hands of all persons except a purchaser forbearer of the legal estate without notice. (See *Cheshire*: *ibid* p. 459; *Rendall* v. *McWhirter*;[9] *Bradley-Hole* v. *Cusen*;[10] *Ferris* v. *Weaven*[11]). Thus the argument by the appellant's counsel on the nature of the respondents' interests before August 5, 1970 must fail.

On the facts before us, we are of the opinion that the vendors sold their property to the respondents and the appellant, under what may be properly described as a building scheme so that the benefits of the restrictive covenants taken by the respondents are attached to the floors bought by the appellant. *Elliston* v. *Reacher*[12] at 665 *per* Parker J. and *Reid* v. *Bickerstaff*[13] at 319 Cozens-Hardy M.R. The ground and the first floors of the building were sold to the respondents with a stipulation annexed to the whole building that the respondents shall have access to the roof top for the inspection of water tank which supplies water to those two floors and that such access would be enjoyed by the respondents via the staircase which was required to be maintained, kept open and clean and hygienic by the respective owners of the floors. This stipulation binds not only the vendors who were then owners of the other five floors, but also the appellant who purchased these floors from the vendors. Certainly the appellant knew of this restriction. By sealing and demolishing the staircase, the appellant therefore acted in breach of the respondents' right which is attached to the whole of the building and he could therefore be restrained from doing so.

The respondents also base their case upon their legal rights as tenant-in-common. Section 11 of the Sabah Land Ordinance (Cap. 68) recognises the concept of tenancy-in-common. In this case the respondents and the appellant are co-owners of the land — Sandakan Town Lease No. 809 to the extent of 2/7 and 5/7, respectively. The dispute before us concerns more with the commercial building erected on it rather than with the land as such. Of course no building can be erected except upon land, and the question of land, albeit incidentally raised, is very important in the concept of tenancy-in-common. The first question is whether under Sabah law, building is to be regarded as land or part of the land upon which it is erected. No definition of land is to be found in the Ordinance itself. However, under section 3 of Sabah Interpretation Ordinance No. 34/1968, "land" is one of the species of properties in the definition of "immovable property". This section says —

> "'Immovable property' includes land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth."

This still leaves "land" undefined; but there can be no doubt that one of the elements of land is earth. Thus, anything fastened permanently to the earth, e.g. building, qualifies for the word "immovable property". Under English law, land includes anything permanently fastened to it. *Jowitt's* Dictionary of English Law, 2nd Ed. Vol. 2 p. 1058, and *Cheshire*, ibid p. 100. There can be no doubt that the building in this case together with the land upon which it is built is land.

If one applies the concept of tenancy-in-common to this case, one will find that whilst the respondents' and the appellant's undivided shares are in different proportions, i.e. 2/7 and 5/7, respectively, both hold the property by unity of possession and therefore occupy it promiscuously (*Cheshire*: ibid p. 302). The fact that the floors of the building owned and occupied by them can be ascertained, i.e. the ground and first floors by the respondents and the rest of the floors by the appellant, insofar as this case is concerned, makes no difference to the operation of the concept of tenancy-in-common. As the building and the land are treated as one whole and as there is no law yet in force to govern separate titles for multi-storey building (Sabah Land (Subsidiary Title) Enactment No. 9/1972 not yet brought into force), occupation of separate floors by the parties is purely *de facto* and can have no legal consequence other than that they are still co-proprietors as described by their title to the property. As co-owners, neither party has a better right than the other. Thus the destruction of part of the property, in this case, the sealing and demolition of staircase by the appellant would enable the respondents to ground an action against him. (*Wilkinson* v. *Haygarth*[14] and *Martyn* v. *Knowllys*[15]). It makes no difference that the registration of their title as co-proprietors only took place on January 29, 1971, whilst the staircase was sealed six months earlier, because from the dates of their respective occupation of the building to the date of the registration the respondents and the appellant were already owners of the building, whatever the nature of their interests may be. We, therefore, agree with the submission of counsel for

the respondents that even from the point of view of tenancy-in-common, the appellant cannot succeed in this appeal.

As the respondents have established their right of access to the roof top and use of the staircase, the next question is to consider the appropriate remedy. The respondents asked for and the learned judge issued a mandatory injunction compelling the appellant to restore the staircase to its former state. The grant of this injunction is entirely discretionary and it is certainly not issued as a matter of course. (*Morris* v. *Redland Bricks Ltd.*[16]). In exercise of its jurisdiction on the issue of mandatory injunction, the court has to be extremely cautious and must act with moderation as the jurisdiction has to be exercised sparingly. (*Wrotham Park Estate* v. *Parkside Home*[17]). It can be issued only in cases where the injury done for the prevention or rectification of which injunction is sought cannot be adequately compensated by pecuniary damages. On the other hand, there is no rule that this injunction must be refused upon the mere ground that the injury had been completed before the suit was filed. Every case has to depend upon its own circumstances, and it is a generally accepted view that the court will not interfere by way of mandatory injunction except in cases in which extreme, or at all events very serious, damage will ensue from its interference being withheld. (*Durell* v. *Pritchard*[18]). The question of cost to the defendant in carrying out the injunction is also a relevant factor. Such cost must be weighed or balanced with the extent of the injury done to the plaintiff (*Morris* v. *Redland Bricks Ltd.*, *supra*).

Applying these principles to the present appeal, we are of the opinion that the respondents are not entitled to the mandatory injunction. The respondents' need to go up the roof top to inspect their water tank is not so imperative as to disturb them or any occupiers of the ground and first floors of the building from peaceful and quiet enjoyment of the property, if they do not go up there so often. In his evidence, respondent No. 1 claimed that before the staircase was sealed he used to go up to inspect the water tank as frequently as once or twice a week and never went up there once since it was sealed. Yet during the period beginning July 1970 to the date of his giving evidence (June 9, 1976), i.e. for a period of six years, he admitted that the restaurant business was not at all affected by water problems. This fact clearly shows that the respondents were really exaggerating their claim as to the compelling need to inspect their water tank as often as once or twice a week for fear that there might be dead mice in it. This possibility was completely rejected by the Town Board Engineer, PW3, who inspected the tank and its overflow outlet. He found the tank to be securely covered and told the court that he did not "believe that rats can get into the water tank from the overflow outlet".

The cost of restoring the staircase is accepted by the learned trial judge to be at $3,200 for each floor, i.e. the total cost of $16,000 for five floors. No evidence was adduced as to how much the value of the respondents' property was diminished because of the demolition of the staircase. In view of the minimal need by the respondents to inspect the water tank, we do not think that it is reasonable for the court to issue a mandatory injunction against the appellant to restore the staircase.

In granting the mandatory injunction against the appellant, the learned judge relied upon *Allport* v. *The Securities Corpn.*[19] In that case, because of the structural alteration involving the demolition of staircase carried out by the landlord, the tenant who was in possession of the 4th and 5th floors of the building lost access to his room by direct route, although a circuitous and less convenient route was provided. Despite the availability of alternative route, which was circuitous and less convenient, the court granted a mandatory injunction against the respondent. We agree with the submission of the learned counsel for the appellant that there is a world of difference between a tenant's access to his room, which must be done several times a day, and the present respondents' access to see the water tank, which according to evidence, had no ill effect on them or the occupiers of the premises despite its non-existence in the last six years. This shows clearly that so long as there is a route by which the respondents can have access to the water tank, there is no case for the injunction to be issued, although the route is circuitous and less convenient, provided of course it is not dangerous. We do not think that the need of the tenant in *Allport's* case is quite the same as the need of the respondents in the present appeal. In our appeal such less convenient and circuitous route was offered by the appellant at the suggestion of the Town Board in that access could be had by the staircase and lift at Gaya Hotel. The upper five floors of the building have now been physically integrated with the adjoining Gaya Hotel of which they form part. We do not think that it is a reasonable order for this court to require the severance of these five floors from their connection with Gaya Hotel. The offer to the respondents to use the staircase and lift of the Hotel, in our view, is a very reasonable one. It is interesting to note that the respondent No. 1 in his evidence exhibited the most unreasonable and uncompromising attitude as regards the offer of use of Gaya Hotel facilities. He said: —

"I do not want the guarantee. I have a right to use the staircase to the roof."

He continued further —

"If I use the Gaya Hotel people mistake me for going there as the place is frequented by prostitutes. It will not only affect my reputation but also the safety of my wife. Sometimes fighting robberies and murders occur in the hotels. I insist on my right to use the staircase as contained in Clauses 10 and 11 of the Purchase Agreement."

When pressed further, he answered —

"I consider the guarantee useless. . . . The guarantee was useless because the letter was written by a person. If this person dies the guarantee is useless. The defendant wrote the guarantee and it will not bind the successor."

Mandatory injunction being a discretionary remedy, the court should not lend its aid to a party who has shown such an unreasonable and uncompromising attitude without justification. Perhaps the respondents are not alone in exhibiting this attitude. The appellant too is nonetheless not free from such fault. In

his evidence he regarded himself as the owner of "*exclusively* the second floor right to the top of the seventh storey including the roof top". It is this attitude as the exclusive owner regardless of the water system supplying the building which led him without consulting the respondents to start making alterations of the building. This high handed action naturally provoked the respondents into hardened attitude of insisting upon their rights. The conduct of both parties provide a good example of how people living in one building should not behave. The conduct of the parties aside, we do not think that we should agree to the issue of mandatory injunction in view of the fact that facilities of the Gaya Hotel are available to the respondents, and we therefore quash the order of the court below as to the issue of mandatory injunction.

There remains now for us to deal with the award of $10,000 damages by the learned trial judge against the appellant. We do not see any basis for this award anywhere either discussed or stated in the learned judge's long judgment. Such a high award of damages in our judgment is not justified. There is no case here for awarding exemplary damages as it does not fall under any of the three rules laid down by Lord Devlin in *Rookes* v. *Barnard*[20] at 1226-1228. Instead, damages in this case should be estimated with reference to the amount of money (a) which will be required to release the appellant from obligation to keep open and maintain the staircase (*Wrotham Park Estate* v. *Parkside Home, supra*); or (b) by which the value of the respondents' property is diminished because of loss of right to use the staircase to go up to the roof top; or (c) which will be required to construct a new water tank to supply water to the respondents' floors in place of the one on the roof top to which he could not have access by the staircase. Whatever amount is estimated is not going to be precise, and at best only an approximate one. If $16,000 is required to be expended for restoring the staircase whilst access to the roof top is available by means of staircase and lift of Gaya Hotel, and such access is not utilised as often as once a week, in our view damages could be adequately assessed with reference to inconvenience caused to the respondents for losing the direct route. We therefore make the following orders:—

(1) the mandatory injunction issued by the court below is quashed;

(2) access to the roof top of the commercial building shall now be granted by the appellant and his successors in title to the respondents and their successors in title by staircase and lift of the adjoining Gaya Hotel, unless they decide between themselves to be otherwise;

(3) damages of $5,000 shall be paid to the respondents.

For the reasons given and subject to the above orders, we dismiss the appeal with costs here and in the court below. Deposit should be paid to the respondents on account of taxed costs.

Appeal dismissed.

Solicitors: *Yap & Chin; Shelly Yap & Co.*

HING KIM PONG v. TEO ENG JIN

[F.C. (Lee Hun Hoe C.J. (Borneo)) July 12 & 16, 1979]
[Kuching — Federal Court Civil Appeal No. 107 of 1979]

Land Law — Caveat — Caveat removed — Application for stay refused — Sarawak Land Code (Cap. 81), ss. 132, 173 & 177.

Practice and Procedure — Caveat removed by order of court — Application for stay refused — Discretion of trial judge.

In this case the appellant and the respondent had participated in a joint venture in the course of which certain lands had been acquired. Subsequently the property was divided between the parties. After this was done, the respondent managed to get the relevant authority to cancel a road reserve so that he was able to get another lot of land for commercial and industrial purposes. The appellant claimed that he was entitled to a final account taking into account the lot of land. He filed a caveat against the lot but the respondent obtained an order for the removal of the caveat. The appellant appealed against this order and also applied for stay of execution but stay of execution was refused. He appealed against this refusal.

Held: stay of execution was a matter within the discretion of the trial judge and unless it was shown that the learned judge had exercised his discretion wrongly, an appellate court would be slow to interfere. The learned judge was justified in refusing stay as it was clear the appellant was more interested in getting monetary payment and the question whether he was entitled to a share in the lot would have to be thrashed out at the hearing of the suit which was only initiated after the caveat was ordered to be removed.

Cases referred to:-

(1) *Serangoon Garden Estate Ltd.* v. *Ang Keng* [1953] M.L.J. 116.

(2) *Lee Pek Choo* v. *Ang Guan Yaw* [1975] 2 M.L.J. 146.

(3) *Staples* v. *Corby* (1901) 19 N.Z.L.R. 539.

(4) *Polini* v. *Gray* (1879-80) 12 Ch. D. 438.

(5) *Eng Mee Yong & Ors.* v. *V. Letchumanan* [1979] 2 M.L.J. 212, 214.

FEDERAL COURT.

Ee Poh Teck for the appellant.

Matthew Chan for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo): Respondent ("the caveatee") is the registered proprietor of certain land at Padungan, Kuching, described as "sub-lot 4" being part of Lot 10 Section 9 Kuching Town Land District. On September 29, 1978 appellant ("the caveator") lodged a caveat claiming to be entitled to or beneficially interested in "sub-lot 4". The caveatee succeeded in obtaining an order on April 21, 1979 from the High Court under section 177 of the Land Code (Cap. 81) for the removal of the caveat. There is an appeal against the decision of the learned judge. The caveator's application for stay of execution was refused. Hence the notice of motion.

It is the contention of appellant that he has satisfied the learned judge of two factors, namely, permanent deprivation and merit, yet stay was refused. He cited *Serangoon Garden Estate Ltd.* v. *Ang Keng*[1] in support. In granting a stay of execution in a possession case it was held that the granting of a stay of execution, though discretionary, should be exercised on correct principles. The fact that the defendant cannot be restored to his original position as a tenant if his appeal succeeds is not sufficient ground. It